

Guilt Beyond Guilt: From Political Theory to Metaphysics with Herbert Morris

Amanda Wilson*

As it is presently conceptualised and applied in criminal law, moral guilt is bound by a narrow, legalistic framework that is rooted in a liberal political philosophy. In this paper, drawing on the work of Herbert Morris, I seek to open up and deepen the concept of moral guilt. I do this through the development of a four-fold typology of guilt that charts Morris's journey from political theory to metaphysics that includes the following forms: moral-legal guilt; moral-psychological guilt; quantum guilt; and metaphysical guilt. In deepening our understanding of moral guilt, the typology compels us to consider alternative conceptions of guilt that would take into account a person who feels guilt not only towards others, but also towards themselves and the world. I argue that Morris's journey has important implications for how we think about the critical relationship between theory and law as well as restorative justice.

'[T]here is ... something about guilt, its connection with caring for others, perhaps, too, its connection with caring for ourselves, that may lead us to think it essential to human life as it should be'.¹

INTRODUCTION

Moral guilt has been described as the 'flagship emotion'² of criminal law. In modern criminal justice, the category of moral guilt is bound by a legal framework that reflects a liberal political philosophy in which wrongdoing is viewed as a violation of a political order by rational agents that needs to be restored. From this standpoint, what lies at the core of criminal justice is a determination of guilt or innocence which branches out to related concepts of responsibility, blame and punishment.³ Despite the centrality of guilt to the orthodox

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- 1 H. Morris, *On Guilt and Innocence: Essays in Legal Philosophy and Moral Psychology* (Berkeley, CA: University of California Press, 1976) 93.
- 2 S. P. Garvey, 'The Moral Emotions of the Criminal Law' (2003) 22 QLR 145, 152.
- 3 This is the orthodox assumption. Against this view, some argue that criminal justice is an administrative process: see, for example, V. Chaio, *Criminal Law in the Age of the Administrative State* (Oxford: OUP, 2018); L. Farmer, *Making the Modern Criminal Law: Criminalization and Civil*

standpoint, the category of moral guilt remains under-studied in a critical direction⁴ compared to related concepts of responsibility, blame and punishment.⁵ In this paper, I seek to challenge the narrow ways in which political theory has conceptualised and applied moral guilt to law. I mount this challenge with the help of Herbert Morris, taking as my focus an immanent critique of Morris's treatment of guilt in three consecutive essays from *On Guilt and Innocence: Essays in Legal Philosophy and Moral Psychology* (1976): 'Persons and Punishment', 'Guilt and Suffering' and 'Shared Guilt'.⁶ My engagement with Morris also serves a wider purpose. In drawing attention to tensions immanent to legal concepts, the method of critique forces us to confront both the critical relationship between theory and law and how our understanding of law should be reconfigured. What appears ostensibly to be a move beyond law invites us to think more deeply about its existing tensions and what, if anything, we should do about them. Such thoughts take me to the idea of a broader legal field and the nature and prospects for restorative justice.

In the Preface to his collected essays, Morris states that a better understanding 'of guilt and related concepts will mean a more informed judgement of the merits of our common moral and legal practices', but also, and importantly, 'a deeper understanding of ourselves and of our conception of the world'.⁷ Both objects are equally important to Morris, but staying true to both means that his account is, necessarily, antinomical. Indeed, as we will shortly see, the developing critique of Morris reveals two competing strands of his thought: one wedded to political theory and the other reaching out to the metaphysical.⁸ One way of reading Morris is as a thinker who over a period of time developed

Order (Oxford: OUP, 2016). Others, like Erin Kelly, question the alignment of the legal criteria for guilt with moral blameworthiness: see E. Kelly, *The Limits of Blame: Rethinking Punishment and Responsibility* (Cambridge, MA: Harvard University Press, 2018). The challenge I mount is different. I argue that criminal justice *is* about guilt, but not in the way that this is normally taken to be the case. There is a deeper and counter meaning to legal guilt of moral guilt which I intend to bring out in this paper.

4 See A. Norrie, 'Criminal Law and Ethics: Beyond Normative Assertion and its Critique' (2017) 80 MLR 955.

5 See, for example, N. Lacey and H. Pickard, 'From the Consulting Room to the Court Room? Taking the Clinical Model of Responsibility Without Blame into the Legal Realm' (2013) 33 *Oxford Journal of Legal Studies* 1; N. Lacey and H. Pickard, 'To Blame or to Forgive? Reconciling Punishment and Forgiveness in Criminal Justice' (2015) 35 *Oxford Journal of Legal Studies* 665. Their work has attempted to move the concept of responsibility forward by challenging its ties to blame. For instance, they suggest that the legal realm should adopt a clinical model of responsibility wherein negative tropes of affective blame are divorced from responsibility. Building on this premise, they seek to reconcile punishment with forgiveness by proposing that the criminal justice system should punish with forgiveness, not blame. Forgiveness affords perpetrators the opportunity for reparation so that they can better both their own lives and the lives of others.

6 Morris, n 1 above. Where relevant, reference will be made to Morris's other writings, however, my method of immanent critique privileges a close reading of the consecutive essays and the unfolding of Morris's thought in the first instance, and in a way that emphasises an element of unselfconscious critical development on his part.

7 *ibid.*, viii.

8 For the purposes of this paper and to be explored further, I take metaphysical to mean moving beyond an ontology of human agency that merely serves or reproduces political theory, and towards an ontology of human agency that is meaningful and important for its own sake. Whether there are satisfactory answers to that at the moment is another question. An example of the kind of ethics that Morris might be interested in that would seem to reflect his metaphysical trajectory

a series of arguments that sit together as a whole and which culminated in a later essay like 'A Paternalistic Theory of Punishment'.⁹ My concern with that approach, however, is that it might miss important things that Morris had to say that were not fully brought out or synthesised in his overall work, but which nonetheless are important in their own right. Alongside Morris's corpus of work on punishment remained other metaphysical commitments that were not so easily incorporated.¹⁰ In that regard, I find Isaiah Berlin's metaphor of the fox and the hedgehog helpful.¹¹ By this Berlin meant someone who, in an attempt to better understand something, either stuck to a path (a hedgehog) or looked at things from different points of view (a fox). What I find interesting in Morris is that although he was someone who tried to stick to a path, he found other things that did not fit within the overall framework so he was both hedgehog and fox, perhaps a foxy hedgehog. Morris tries to maintain the perspective he lays down at the start of his book about moral guilt being narrowly and indelibly grafted to a legalistic framework rooted in liberal political philosophy. But at the same time, his creative thinking forces him to see guilt in more expansive, metaphysical ways to the extent that he (unselfconsciously) comes to deconstruct his own position. In the process, guilt takes on a broader and deeper meaning: one that ends up operating as a critique of legalistic guilt, and questioning the boundaries of guilt and shame. I argue that this is where the real value of Morris's work lies for it gives rise to a creative tension. The dance between competing strands of Morris's thought sheds profound light on issues that lie at the core of orthodox criminal law theory and practices. His unfolding critique of moral-legal guilt (and punishment) and the creative possibilities that stem from broader, non-legal explorations of moral guilt compel us to consider alternative conceptions of guilt, responsibility and restoration that take into account a person who feels guilt – not just towards others, but also towards themselves and the world.

is Martin Buber's 'I-Thou' and the expansion of this concept in M. Buber, *The Knowledge of Man: A Philosophy of the Interhuman* M. Friedman and R.G. Smith (trans) (New York: Harper & Row, 1965). See also text to notes 67 and 80 below. Buber's ethics take the relation between oneself and another beyond a dyad. The synergy between this and Morris's thoughts will become more apparent in the forthcoming analysis of moral-psychological, quantum and metaphysical guilt as well as the section on Identification. On the connection between Morris and Buber, see also H. Morris (ed), *Guilt and Shame* (Belmont, CA: Wadsworth Publishing, 1971), which contains a reproduction of Buber's essay 'Guilt and Guilt Feelings'.

- 9 H. Morris, 'A Paternalistic Theory of Punishment' (1981) 18 *American Philosophical Quarterly* 263.
- 10 The same author who writes 'A Paternalistic Theory of Punishment' also writes a theory of the soul: see H. Morris, 'On the Soul' (2018) 94 *Philosophy* 221.
- 11 I. Berlin, *The Hedgehog and the Fox: An Essay on Tolstoy's View of History* (London: Weidenfeld & Nicholson, 1953). The metaphor comes from the following line of a fragment by the Greek poet Archilochus: 'The fox knows many things, but the hedgehog knows one big thing'. Berlin characterises hedgehogs as those who 'relate everything to a single central vision, one system, less or more coherent or articulate, in terms of which they understand, think and feel – a single, universal, organising principle in terms of which alone all that they are and say has significance'. Foxes, on the other hand, are those whose 'thought is scattered or diffused, moving on many levels, seizing upon the essence of a vast variety of experiences and objects for what they are in themselves, without, consciously or unconsciously, seeking to fit them into, or exclude them from, any one unchanging, all-embracing, sometimes self-contradictory and incomplete, at times fanatical, unitary inner vision'. See also L. Green, 'Jurisprudence for Foxes' (2012) 3 *Transnational Legal Theory* 150.

In his essay 'Shame Creeps through Guilt and Feels like Retribution' (1999), Jeffrie Murphy commends Morris for his openness to both 'moral and spiritual insights' that lead him to illuminating conclusions about the centrality of shame to a fuller understanding of guilt which has important implications 'for punishment and forgiveness'.¹² In describing how Morris wavers between guilt and what he identifies as 'guilt before ourselves' in 'cases where the rest of us might speak of shame',¹³ Murphy pinpoints an important dilemma concerning the instability of Morris's categories. He suggests that the problem may lie with the concepts and their relationship to their object, that is, the 'moral phenomenology' at play which might be 'too complex to be captured by either concept'.¹⁴ In this paper, I take Murphy's suggestion about this difficulty seriously and argue for its truth. Through the method of immanent critique, I hope to arrive at a much stronger analysis of guilt and its interrelation with shame. In the first of the three essays, Morris starts from the position that moral guilt is narrowly and indelibly grafted to law. Guilt is predefined as a legal concept and its oppositional corollary is shame. As Morris begins to open up guilt in the subsequent essays, however, he comes to deconstruct his own original position. Starting from a differentiation of guilt and shame, he undoes this distinction in favour of a closer alignment of the two terms. This process of self-deconstruction is not fully self-conscious, but it deepens our understanding of shame and guilt and their interrelation in important ways. Through this deconstruction of Morris's unfolding argument, I develop a four-fold typology of guilt¹⁵ that includes moral-legal guilt, moral-psychological guilt, what I will call quantum guilt, and metaphysical guilt. This typology serves to categorise distinctive forms of guilt as they surface in Morris's developing account.¹⁶ It is helpful to outline the four categories in brief here before proceeding to develop the analysis below:

(1) *Moral-legal guilt* describes what it is to *be* guilty of wrongdoing in terms analogous to those of law.¹⁷ A person commits a wrongful act. The person did it voluntarily and is culpable for the wrongdoing. Law then ascribes blame and

12 J.G. Murphy, 'Shame Creeps Through Guilt and Feels Like Retribution' (1999) 18 *Law and Philosophy* 327, 327-328.

13 *ibid.*, 337.

14 *ibid.*, 343.

15 To clarify, this is not the same as Karl Jaspers's typology of legal, political, moral and metaphysical guilt. His legal and my moral-legal guilt are similar. Political guilt, meaning liability of a political entity and its people for wrongs done by its leadership, is not included here. His moral guilt is more narrowly defined, meaning personal conscience. I expand this to include the moral psychological emotions and quantum guilt. Metaphysical guilt is essentially the same.

16 Of course any typology is crude and mine is no exception. As we will see, some of the forms do intersect.

17 For the purposes of this paper, I am going to refer to what Morris calls 'legal guilt' as 'moral-legal guilt'. While I recognise that moral-legal guilt is normatively aligned, I will distinguish this from 'moral-psychological guilt' which is different because it links the moral not to normative framing, but to psychological framing. Of course, as will be explored later, that is not to say that the person found morally-legally guilty cannot at the same time feel moral-psychological guilt as well, but they are conceptually different. While Morris does not separate moral-legal guilt from psychologically-framed guilt for the same reasons that I do, he nonetheless maintains the distinction in his writings. See, for example, H. Morris, 'Sex, Shame, and Assorted Other Topics' (2003) 22 *Quinnipiac University Law Review* 123, 142-143, where he states that '[o]ne's being morally culpable with respect to some wrong' – what I term moral-legal guilt – 'and one's being morally guilty of that wrong are distinct concepts'.

responsibility to the person for the wrong and they are deemed guilty. Because this violation has thrown out the balance of benefits and obligations, the law must now redress this imbalance and 'even the score'. This typically involves punishment as a means of righting the wrong.

(2) *Moral-psychological guilt* describes the state of *feeling* guilty and where that feeling comes from. When we feel guilty we feel bad, 'rotten, depleted of energy, and tense'.¹⁸ The sources of this feeling are painful to us. They come from moral and emotional reactions to a situation we have brought about. A person is hurt and their pain 'pains us', but there is also our own pain that comes from our separation from a union that is valued by us. In a loving union we feel whole and complete, however, when we are 'cut off' from this union with others, we feel the pain of being incomplete and a division within ourselves. This gives rise to 'antagonism' directed at oneself for acting contrary to 'what one is attached to', which in turn feeds the division felt within oneself.¹⁹ There is also a 'tension to do something'; to relieve oneself of guilt so that one can come back to union and again be at one 'with others and oneself' in a state of atonement.²⁰ One could call this guilt 'psychosomatic' in that it is experienced as a moral emotion and in a way that is embodied.

(3) *Quantum guilt* is the term I use to describe the state of reflecting on persistent guilt.²¹ A person stuck in a revolving door of hurting or harming another, feeling guilty, saying sorry and making up for their wrongdoing might be puzzled as to why their feelings and actions do not lead to change. Something inside such a person repeatedly 'interferes with the love'²² they have for another (or others) and themselves. Their puzzlement is likely to persist until they shift their gaze to 'wider and deeper patterns'²³ of behaviour. Such a shift signals a greater respect for the past than just feeling guilty and making amends for an individual act. It involves a deeper questioning of behaviour: the person not only feels bad about continuing to do wrong things, they feel bad because they *are* the sort of person who continues to do those things. Reflecting on persistent guilt means reflecting on the person you are which can lead to a deeper sense of guilt, and a desire to fundamentally change who you are.

(4) *Metaphysical guilt*, first coined by Karl Jaspers as a way of capturing the guilt of the German people after World War II, describes a deeper state of guilt that relates to being human and existing in the world. This has two forms. First, we might feel metaphysical guilt if we fail to act or do enough to prevent bad things from happening. Second, we might also feel metaphysical guilt for 'remaining alive when others have their lives unjustly taken'.²⁴ This leads to three aspects of metaphysical guilt. The first is a broad sense of guilt at being human: the idea that 'we are all guilty' by virtue of fault in the human race so we feel guilt at *being* human. The second aspect relates to a shared or collective sense of guilt

18 Morris, n 1 above, 99.

19 *ibid.*, 100.

20 *ibid.*

21 To be clear, this is not Morris's own term/concept, but it seems to me to be precisely what it describes. It is my own term of art. See also text to n 69 below.

22 Morris, n 1 above, 109.

23 *ibid.*

24 *ibid.*, 134.

with people who did wrong things. For example, a German might feel bad for being German because of what the Germans did to Jewish people. The third is a sense of guilt about one's advantage over another (or others) such as not doing enough and/or surviving when another died.

The remainder of the paper is divided into four sections. In the first, I outline the four-fold typology of guilt developed through Morris's deconstruction of moral-legal guilt. I also identify two forms of restoration that emerge in this process. The second section examines the place of 'identification' across the four forms. Drawing on a later piece by Morris titled 'Nonmoral Guilt',²⁵ I use identification as a mechanism through which to help understand and qualify the differences between the forms of guilt. In the third section, I will begin to explain why Morris's work is important for a legal understanding of criminal justice. I also consider the relationship between what I have argued and the way in which restorative justice is understood theoretically. I conclude by drawing attention to the under-realised transformative potential of moral guilt for both our theory and our practice.

A FOUR-FOLD TYPOLOGY OF GUILT

Moral-legal guilt

Do we not have too limited a conception of a responsible person ...? To be sure he will naturally incline toward tending to any wounds he inflicts, for that is a sign of his caring. But can we not also suppose that he sees himself as responding not to others when he does what he disapproves of but to himself?²⁶

In a short sub-section of his essay 'Persons and Punishment' (1976) which he titles 'Guilt and Shame', Morris sets up an initial contrast between a guilt morality and a shame morality. However, in this early piece, what he ends up establishing is a naïve, though widely accepted, distinction between a limited concept of *moral-legal guilt* and shame.²⁷ He starts with the example of a child hitting a playmate. A child might be told by their parent that what they did was wrong, that they are a 'bad boy' and that they will be punished if they do it again. Over time, this may lead to the acquisition of the concept of rule violation and subsequent feelings of guilt if the rule is violated once more. Morris calls this a guilt morality, but he is actually describing moral-legal guilt, or at least the state of being guilty of wrongdoing in terms analogous to those of law. A person commits a wrong, they did it voluntarily, and are culpable for the wrongdoing. Blame and responsibility are ascribed to the person and they are deemed guilty.

25 H. Morris, 'Nonmoral Guilt' in F. Schoeman (ed), *Responsibility, Character, and the Emotions: New Essays in Moral Psychology* (Cambridge: Cambridge University Press, 1987).

26 H. Morris, 'Guilt and Punishment' (1971) 52 *Personalist* 305, 321.

27 This distinction has achieved traction among other writers as well. See, for example, M.C. Nussbaum, *Hiding from Humanity: Disgust, Shame and the Law* (Oxford: Princeton University Press, 2004); B. Williams, *Shame and Necessity* (Berkeley, CA: University of California Press, 1993); R. Wollheim, *On the Emotions* (New Haven, CT: Yale University Press, 1999).

Punishment typically follows as a means of righting the wrong and thereby redressing the balance of benefits and burdens. A different response to the same conduct might be as follows. The child who hits their playmate may be told that only animals behave like that, not human beings, and then the parent might 'turn away from the child'.²⁸ Over time, the child may come to understand a 'conception of a valued or model identity, accept this and feel shame when he fails to correspond to it'.²⁹ This, Morris says, is the essence of a shame morality.

Morris identifies several features of this shame morality that he claims are different from that of guilt: shame is evaluated through a model identity in contrast to guilt, which is evaluated in reference to failing to meet a rule; shame is connected to the concept of falling short of something and failure is a matter of degree, whereas guilt is about failure to meet a minimum threshold; unlike guilt, fault is not an essential feature of shame; identity and self-worth are what is valued in shame, whereas with guilt what is valued is relationships to others; shame is relieved by changing who one is and is thus creative, whereas guilt is restorative of the past; shame is tied to sight and not being able to stand the sight of ourselves, while guilt is tied to hearing 'the voice of conscience'; shame threatens one's worth and status whereas with guilt, a person's status and worth remain intact.³⁰

We can, however, already see here some overlap between guilt and shame. While there may be a difference between a child feeling bad for doing something wrong and feeling bad for being the sort of person that did something wrong, the difference is evidently more intricate and less clear than Morris admits. Why can't shame be essentially tied to fault? Why can a person only feel guilt in situations where they have damaged a relationship with others? It is conceivable that a person could feel guilt *and* shame in these scenarios. Splitting off guilt and shame in the way Morris does in this initial foray is problematic because the contrast generated is in reference to a legal concept of guilt not to what I will later identify as a broader conception of moral guilt. For Morris, guilt 'finds its natural role within law' to the extent that even outside of the formal bounds of law, guilt 'clearly has legal overtones'.³¹ Shame, then, becomes the 'other' of (legal) guilt. Thus claims are made about what shame is (and, equally, what guilt is not) that Morris himself later undermines.

This, then, is Morris's starting point: analysis of a concept of guilt that is narrow and analogised with law. What we find as we proceed is that this narrow conception of guilt as separate from shame breaks down as Morris further explores what guilt means. We see this as he develops a deeper account of guilt as moral-psychological. Before we turn to that, however, I want to note a key

28 Morris, n 1 above, 60.

29 *ibid.*

30 *ibid.*, 60–62. The last of Morris's claims – that status and worth remain intact with guilt – has been widely contested by restorative justice advocates who argue for 'reintegrative shaming' as an alternative to guilt precisely because of the stigmatising affects guilt gives rise to: see J. Braithwaite, *Crime, Shame and Reintegration* (Cambridge: Cambridge University Press, 1989). cf Nussbaum, n 27 above, who argues that law should run with guilt not shame because the latter is dangerous and unreliable. Interestingly, Nussbaum is supportive of restorative justice, however, this is because she submits that it is really about guilt, not shame.

31 Morris, n 1 above, 62.

point to be developed, concerning Morris's doubling of the use of the concept of restoration. The place of restoration in a (legal) guilt morality is tied to a particular notion of restoration – the restoring of a previously broken right and redressing the balance of benefits and burdens. This is restoration in a typical, retributive sense.³² A broader sense of guilt, however, could lead to further non-legal forms of restoration such as atonement, reconciliation and forgiveness. Guilt in the narrow sense is concerned with maintaining or achieving the minimum, balancing freedoms and obligations, protecting values, curtailing harm to others, and incentives among citizens of a polity to 'restore relationships'.³³ It is not concerned with 'motives, with purity of heart, grandeur of soul'.³⁴ For Morris, it is only with shame that 'our concern is that individuals realize to the fullest what they have within them, when what one is takes priority over a nice balance in relations with others ...'.³⁵ Therefore, it would only be with shame that a *broader* sense of restoration would be relevant. Morris later, however, invalidates this standpoint as he develops the concept of guilt. Indeed, his following essays consider how precisely guilt involves interest in these concerns that are to do with restoration in a deeper sense. Restoration as a narrower, legal form contrasts with it as a broader, ethical form. As we shall shortly see, this contrast unfolds in Morris's texts. In the next sub-section, we will examine two kinds of restoration that come to the fore as his analysis progresses.

Moral-psychological guilt

The person who views the pain he has caused another either responds as a friend or lover would or he does not. If not, what is essential to the relationship, a condition of one's heart and mind, will hardly be brought about by punishment. If the person responds as a friend or lover would with pain and renewed commitment to the relationship, the injured party, if a friend or lover, responds with forgiveness.³⁶

32 See, for example, G.W.F. Hegel, *Outlines of the Philosophy of Right* (Oxford: OUP, 2008); H. Morris, 'Persons and Punishment' (1968) 52 *Monist* 475. Retributivism has many varieties: see J. Cottingham, 'Varieties of Retribution' (1979) 29 *Philosophical Quarterly* 238. However, as I deploy the term, I take it to represent the logic whereby punishment, as a mechanism for restoration, finds meaning and is justified on the basis of its relation to past culpable wrongdoing. This conception is loosely based on Antony Duff's suggestion that the lifeblood of retributivist thought which both 'gives criminal punishment its meaning' and lies at 'the core of its normative justification' is, simply put, its relationship 'to the past crime for which it is imposed': see R.A. Duff, 'Retrieving Retributivism' in M.D. White (ed), *Retributivism: Essays on Theory and Policy* (Oxford: OUP, 2011) 3. At its core, then, retributivism is backward-looking and not tied to 'to any contingent future benefits that it might bring': *ibid.* This is not to deny that some strands of retributivist thought have future 'benefits' in their line of sight, but rather to emphasise that the retributivist impulse is, in the first instance, grounded in past wrongdoing. The hedgehog in Morris subscribes to this conception. For instance, in response to assaults on guilt that threaten its decline, Morris states that '[g]uilt and punishment are viewed by some as fundamentally irrational modes of viewing human conduct ... From this perspective it is never a former evil that justifies the infliction of present pain, only a future good to be realized': see H. Morris, 'Guilt' in S. H. Kadish (ed), *Encyclopaedia of Crime and Justice* (New York, NY: Free Press, 1983) 824.

33 Morris, n 1 above, 63.

34 *ibid.* I will say more about Morris's emphasis on the soul later.

35 *ibid.*

36 *ibid.*, 105.

In the essay called ‘Guilt and Suffering’ that follows the short section in ‘Persons and Punishment’ which distinguishes moral-legal guilt and shame, Morris prepares himself for a break with the earlier line of thought around moral-legal guilt and restoration so that he can relaunch his argument. He says, ‘in the revealing and, yet, I fear, also misleading, legal imagery coloring our thought about guilt, the debt must either be paid, exacted, or forgiven’.³⁷ Why the legal imagery, which he had himself relied upon previously, is revealing *and* misleading is not explained; however, this important intermission paves the way for a deeper ethical account of guilt.³⁸ In order to describe what it means in moral and emotional terms to *feel guilty* and where this feeling comes from, Morris must now move beyond the bounds of moral-legal guilt and into the realm of a broader moral psychology of guilt anchored in the relational dynamics of ethical life.

In feeling guilty, he now argues, in this second essay we feel bad, ‘rotten, depleted of energy, and tense’.³⁹ We feel pain that stems from being separated from a valued union with others. In this union, one shares a ‘commitment to the same values and because of this one is the recipient of approval, benefits, warmth, and favors associated with the relationship’.⁴⁰ So when we are cut off from our union with others through wrongdoing, the feeling is ‘intensely painful, and the pain involved in guilt resembles this’.⁴¹ A person who feels guilty thus feels incomplete and no longer whole. A division within oneself is also felt because one has destroyed what one ‘loved and thus also destroyed a part of oneself’.⁴² This generates antagonism towards oneself for acting against that which one values. In turn, this fuels the division felt within oneself. Feeling bad also arises out of pressure to act so as to relieve oneself of the guilt feeling. One is relieved of guilt when one feels one is once more ‘joined together with others and with oneself ... [and] no longer divided within and at war with’⁴³ oneself and others. The need to ‘make amends, to mend what has been damaged, and to be at one again with others and oneself is at the core of guilt’ and if successful, ‘it is atonement, being at one with’.⁴⁴ What Morris is beginning to describe here is

37 *ibid.* 98.

38 Morris’s developing thoughts here seem to be heavily influenced by John Wisdom and provide further evidence of a trajectory in Morris’s thinking towards the metaphysical. For instance, Wisdom states, ‘[t]he metaphysician brings into the light certain old-established and invaluable models which we use in order to grasp the characters of sorts of questions, statements and proofs. He does this not because he plans to discard these models as merely misleading but so that we may control them instead of their controlling us, so that we may see how they illuminate and how they distort’: see J. Wisdom, *Philosophy and Psycho-Analysis* (Oxford: Basil Blackwell, 1964) 274.

39 Morris, n 1 above, 99.

40 *ibid.* 96. It is unclear whether Morris is speaking only of law and legal or political union here. The reference to ‘benefits’ implies an intent to hold onto a legal or political-theoretical conception of union, however, Morris equally labours the point that being in union is what makes one able to function as a whole and that without it, one would be incomplete. This takes us beyond the legal and into the territory of something more relational and thus metaphysical. This particular formulation is transitional.

41 *ibid.* 99.

42 *ibid.* 100.

43 *ibid.*

44 *ibid.*

what I term moral-psychological guilt. As the name suggests, it takes us into the *feeling* of guilt and the way that feeling relates to one's ethical life with others. Moral-legal guilt remains at a more formal level, involving the readjustment of arm's length relations. Moral-psychological guilt takes us deeper (ethically) than moral-legal guilt. It emphasises the centrality of our relations with others to a fuller understanding of guilt rooted in an expressly ethical experience. This guilt is experienced as a moral failure, but it is also experienced on an emotional/affective level, and as an embodied sentiment. The psychological and the physiologically felt come together to create an ethical experience that can be described as psychosomatic.

This returns me to the point above about a different meaning of restoration. As Morris moves on to describe pain and its connection to guilt and restoration, a second kind of restoration emerges, as it were, without him knowing it. Pain can arise as a spontaneous expression of feeling guilty (moral-psychological guilt) or it can be non-spontaneous and deliberately chosen as a means of relieving the feeling of guilt. An example of the latter would be submitting oneself to moral-legal guilt and blame. Painful feeling sits between the legal and the moral and has a different inflection depending on its source. Under a moral-legal guilt framework, 'persons possess a conception not just of separation from others but of coming together again with them, a conception of mending what has been torn, repairing what has been damaged' and 'asking for and receiving forgiveness',⁴⁵ making sacrifices, reparation and punishment ... have the significance of a rite of passage back to union'.⁴⁶ This generates a sense of restoration within a legal framework, but a contrast begins to develop with a deeper sense of restoration in moral-psychological terms. Morris goes on to argue that the characteristics of guilt, that is, the ability to come back to union and right the wrong are what justifiably attract people to 'structure situations so that they may feel guilt rather than some other way, a way that, because restoration is thought impossible, may be more painful than feeling guilty'.⁴⁷ What would this pain be that is not connected to restoration, or, more precisely, what kind of restoration is Morris speaking of here?

In saying this, Morris brings together two themes that he will later come to separate, but at this juncture, he is not quite sure how it will play out.⁴⁸ The sort of pain linked to the restoring of a right or righting a wrong is deliberately chosen and is not characteristic of 'a condition of one's heart'.⁴⁹ It is valued for what it is: pain brought on as part of an external legal process. Spontaneous *psychological* and *emotional* pain, however, is valued because it is an intimate reflection

45 Morris does not elaborate on what forgiveness is intended to mean in relation to a legal restoration framework. It could mean a formal civil process, such as asking for forgiveness for taking people's land away in a transitional justice setting, but this seems out of place here.

46 Morris, n 1 above, 96.

47 *ibid.*, 97.

48 Following his earlier claim that shame leads to creativity and guilt to restoration, I suggest that feeling 'some other way' here might be an indirect reference to shame. While feeling guilt can be relieved by restoring a right, shame, on the other hand, is arguably more painful because it involves fundamentally changing who one is. Alternatively, it could be a reference to a deeper feeling of guilt which, as Morris goes on to demonstrate, is unable to be relieved by legal restoration alone.

49 Morris, n 1 above, 102.

of 'one's feelings about oneself and one's feelings about and commitment to a damaged relationship'.⁵⁰ Both sources of pain look for satisfaction, but for different reasons. The moral-legal guilt structure and its associated vehicles for restoration act in their own way, however, they cannot by themselves relieve a person from feeling guilty, and get one to a state of authentic, moral atonement:

Punishment by itself is never, I believe, restorative of close relationships defined by feelings and attitudes, though in highly structured social situations its infliction may be viewed as restoring a certain disrupted rule-established equilibrium of benefits and burdens. Punishment is a common response to wrongdoing in nonreciprocal, parent-child relationships and in impersonal, reciprocal legal situations. The role of punishment is non-existent, insignificant, or positively perverse in contexts where moral wrong is done a stranger or where a friendship or love relationship based on affection, respect, and trust has been damaged.⁵¹

Morris is acutely aware of the need to go beyond legal categories, but does not necessarily think through the line he is drawing between two kinds of restoration. Punishment cannot restore relationships 'defined by feelings and commitments'.⁵² Instead something is required from the person who was violated *and* the guilty person if there is to be 'restoration – forgiveness'.⁵³ The use of the terms 'restoration' and 'forgiveness' is somewhat confusing here because unlike prior references to these terms, here their use refers to deeper senses of both restoration and forgiveness that go beyond the moral-legal guilt framework. Legal punishment cannot get you to moral-psychological restoration: moral-psychological restoration requires something else. Here, restoration has to take on two different meanings: a legal and a moral. The legal involves a specific form of restorative atonement, one that would be consistent with the requirements at the level of social relations and political philosophy: there is a balance of benefits and burdens and the person who has broken the law has upset this balance so you want to restore the sense of there not being an advantage. That person then places themselves back 'at one with' the legal and political system to restore the balance. Moral-psychological restoration is different. A person feels bad about the wrong they did and they reflect on how this goes against what they value within themselves. They therefore feel the need to be at one again with others and within themselves.⁵⁴ One could also talk of restorative atonement though it would be at a deeper, moral level – one that need not necessarily be connected to legal or political philosophy at all.⁵⁵ In the

50 *ibid.*

51 *ibid.*, 104–105.

52 *ibid.*, 105.

53 *ibid.*

54 Morris's notion of non-legal restoration/atonement hints at a deeper connection between shame and guilt in that he makes reference to both others *and* oneself.

55 In saying this I am not suggesting that deeper, restorative atonement (what I will call moral-psychological restoration) is irrelevant to criminal justice. On the contrary, I think it is directly relevant to thinking about how we respond to wrongdoing. Rather my point is to reinforce Morris's own contention that punishment is immaterial to the restoration of relations 'defined by feelings and commitments'. Despite this, one may still want to press on the relevance of moral-psychological guilt to punishment, drawing attention to what Morris later says in 'A

following passage, Morris continues to build on moral-psychological restoration as distinct from legal restoration by coming back to the significance of pain and the nature of the satisfaction derived from it:

Part of what it means to love another, as well as oneself, is not only pain felt when the loved object is hurt but pain one is prepared to face for the loved one. Therefore, in a genuine restorative response, there may be satisfaction derived from restoring, a satisfaction derived from giving something to one for whom one cares, and a satisfaction derived from experiencing pain, for this makes apparent how deeply hurt one has been by the damage and how deeply committed one is to the relationship.⁵⁶

In thinking about moral-psychological guilt, and the pain that comes from feeling bad about what one has done, Morris is moving away from the concept of moral-legal guilt, and into the psychological personality of the guilty person and their interpersonal relation to the victim. His argument has opened up two distinct modalities of guilt and restoration. It should also be noticed that the second modality, moral-psychological guilt, opens the door to a rethinking of the guilt-shame contrast with which Morris started. This is because to feel psychologically bad about what one has done to another is not far from feeling bad that one could have done such a thing, or indeed been the kind of person who could have acted in that way. The territory of guilt begins to elide into that of shame. If that elision is a possible deduction from Morris's developing account of guilt, it is taken further in the next concept of guilt, as we will now see.

Paternalistic Theory of Punishment': see Morris, n 9 above. In that paper, Morris attempts to justify punishment on the grounds that it promotes a kind of 'moral good' for would-be and actual perpetrators and suggests that part of this good is that 'one feel guilt over the wrongdoing': *ibid*, 265. However, Morris has since stated that it was never his intention to claim that punishment is either necessary for the good to be realised or that punishment would assure this: see Morris, n 17 above. Instead, he only wanted to 'claim that punishment *might* be viewed as an important element in the good *sometimes* being realized': *ibid*, 134 (emphasis added). Thus we should not read guilt feelings into punishment for they are not material to it. Of course, there may be circumstances where in practice, moral-legal guilt and moral-psychological guilt coincide – for instance, a person deemed morally-legally guilty and subject to punishment may also feel moral-psychological guilt over their wrongdoing – though any such interface between them should not, according to Morris, be read as constitutive. The line Morris draws between 'being guilty' (moral-legal guilt) and 'feeling guilty' (moral-psychological guilt) is clear and he holds onto it in other writings. See, for example, Morris 1983, n 32 above, where he makes further distinctions within the moral-legal guilt concept between what he calls 'legally operative guilt' (the verdict of guilt) from 'factual legal guilt' (conditions that must be met for legal guilt). Here, he argues that 'it is possible and no doubt even common' that a disposition to feel guilt is not related to legally operative/factual legal guilt and only conservatively suggest that a 'vulnerability to the feeling of guilt *may* be connected to the legal practice embodying the concept of guilt': *ibid*, 823–824 (emphasis added).

56 Morris, n 1 above, 106.

Quantum guilt

Can we not conceive of a responsible man who sees his conduct always as a reflection on his worth and whose conduct in response to hurting others is not seen as atonement, but something like rebirth?⁵⁷

In the final section of 'Guilt and Suffering', Morris once again resets the concept of guilt in a way that moves beyond the law. Moral-legal guilt is further limited because it does not take the past 'seriously enough':

What is most troubling of guilt is its focus on some specific past wrong and the righting of it. Thinking in terms of guilt alone too easily locks one into an endless round of hurt done, hurt felt, and hurt made up for. All the while one must wonder, 'is not there something more to be said, something more to be done, something more to be achieved?'.⁵⁸

We think we are thinking about the past, however, the past appears actually to be obscured. Here the issue of paradox in the criticism of legal punishment emerges. Morris gives an example of a man asking for forgiveness from a woman whom he has repeatedly wronged. She replies "... I've had all I can take of your indifference and your guilt because of your indifference and your pleas for forgiveness because of your guilt ...".⁵⁹ She does not offer the man forgiveness. In this scenario, Morris questions whether the logic of guilt in which the man 'feels and acts' is channelling 'responses in a way that leads to his avoiding what he must face in his past if the hurt to others and himself is to diminish⁶⁰ or dissipate entirely. This contemplation leads Morris to the edge of the territory of psychoanalysis.⁶¹ He observes that something in the man is repeatedly interfering 'with the love he has for the woman ... [and] with the love he would like to be able to have for himself'.⁶² Continually racked by feelings of guilt the man might be puzzled 'by his feelings and conduct' and will continue to be puzzled 'until he shifts his gaze from the particular wrong and the making up of it to wider and deeper patterns, patterns that once grasped allow him to see how, for example, what in his past with another woman explains his feelings and conduct towards the woman in the present'.⁶³ In asking why he does these things that are 'self-defeating' and cause suffering to himself and someone that he loves, the man can get to a place of greater respect for the past than where he was just guilty and sorry. Linking a greater respect for the past with the present may also reveal '... that he is taking more seriously who he presently

⁵⁷ Morris, n 26 above, 321.

⁵⁸ Morris, n 1 above, 108–109.

⁵⁹ *ibid.*, 109.

⁶⁰ *ibid.*

⁶¹ I suggest that Morris's metaphysical trajectory is what moves him towards psychoanalysis. For an example of how this kind of approach triggers a psychoanalytic framing, see Wisdom, n 38 above. Morris appears to rely on many of Wisdom's insights in the discussion I have categorised under quantum guilt. This discussion serves to identify important deficits in orthodox legal thinking about guilt and the limits of attendant practices that typically follow from this thought.

⁶² Morris, n 1 above, 109.

⁶³ *ibid.*

is and who he will be'.⁶⁴ Questioning why he does these things 'may signal a concern [more] with fundamental change than with restoration'.⁶⁵ The quote from Morris that starts this section⁶⁶ is illustrative of this distinction: '[c]an we not conceive of a responsible man who sees his conduct always as a reflection on his worth and whose conduct in response to hurting others is not seen as atonement, but something like rebirth?'⁶⁷

Once Morris starts speaking about rebirth of a person, he is surely on the way to thinking about the shame the person feels for who he is, and has been. Reflecting on persistent guilt means reflecting systematically on the person you are, which results in an inner tumult that starts to look much more like shame than guilt if the characteristic nature of shame is that it invokes a negative self-judgement about a person that calls into question their whole being.⁶⁸ The man not only feels bad about the wrong things he continues to do, he feels bad *because he continues* to do them, and *because he is* the sort of person who continues to do them. The term I use here, quantum guilt, describes the qualitative change that happens within the man which he arrives at by reflecting on his pattern of behaviour, not merely an event or events. This quantum change can lead to enduring transformation. Quantum guilt builds on moral-psychological guilt. Unlike the latter, however, with quantum guilt the guilt is repeated and compounding. It builds up to a point where the focus shifts to introspection on one's character and the type of person one is.⁶⁹ This deeper form of guilt thus

⁶⁴ *ibid.*

⁶⁵ *ibid.*

⁶⁶ The quote comes from 'Guilt and Punishment' which is only partially reproduced in Morris's collected essays on legal philosophy and moral psychology. An extract from the essay is featured in 'Persons and Punishment' where Morris contrasts moral-legal guilt and shame. The extracted section is titled 'Guilt and Shame'. Why Morris only reproduced such a small section in 'Persons and Punishment' remains unclear. One reason might be that he needed to set up the contrast between guilt and shame early on in the book because his later essays hark back to the distinction. Another reason might be that he thought the next essay ('Guilt and Suffering') did a better job of documenting his thoughts on the move away from legal restoration to something else.

⁶⁷ Morris, n 26 above, 321. The idea of rebirth also appears in Martin Buber's essay 'Guilt and Guilt Feelings': Buber, n 8 above. Buber talks about his encounters with men who have acted 'from the high conscience as men who had become guilty' and how these men 'grew into an existential state to which the name of rebirth is due': *ibid.*, 148. The quote comes after a discussion on reconciliation. There he suggests that reconciliation is only valid when it comes from 'the arbitrary working of the existence' one has achieved which he claims, can only happen 'out of the core of a transformed relationship to the world, a new service to the world with the renewed forces of the renewed man': *ibid.*, 147–148. As we will see in the next sub-section, the sort of metaphysical ethics which Buber alludes to here surfaces in Morris's 'Shared Guilt' essay when he considers the question of failure to prevent evil. This leads him to metaphysical guilt.

⁶⁸ On the link between shame and wholeness, see H.M. Lynd, *On Shame and the Search for Identity* (New York, NY: Harcourt, Brace & World Inc, 1958) 49, who argues that '[s]hame is an experience that affects and is affected by the whole self'. An extract from Lynd's book titled 'The Nature of Shame' appears in Morris's edited collection *Guilt and Shame*.

⁶⁹ There are two reasons why I adopt the term 'quantum guilt'. The first is that this guilt is aggregative which means there is a weightiness to it (quantum is a term used to denote magnitude). The second reason is that it describes a qualitative change associated with weightiness. There is a synergy between this and the notion of a 'quantum leap' in quantum mechanics. Quantum mechanics is about the behaviour of particles and how they change (for example the division of atoms resulting in protons and electrons which are qualitatively different to atoms). My concept of quantum guilt is about the behaviour of human beings and how they, too, can qualitatively

moves across a borderline and becomes much closer to shame. This was Murphy's point when he suggested that 'shame creeps through guilt and feels like retribution'.⁷⁰ It is with shame that then comes the possibility for fundamental change and rebirth because one's pain is about who one is as manifested in what one has (repeatedly) done. It is important to note, however, that Morris does not make any explicit reference to shame here. What might account for this? I suggest that the omission is revealing for it perhaps indicates that Morris is struggling with the guilt-shame distinction he established in 'Persons and Punishment', which he carries over into 'Guilt and Suffering'.⁷¹ While the place of shame cannot be suppressed (as evidenced by the rebirth scenario), at the same time, the contrast with guilt no longer stands.

Metaphysical guilt

even without fault we may do great damage; it may derive from an understandable ignorance or blindness and only after much soul-searching might we discover the harm and our role in it. This may not be moral blameworthiness but the guilt we feel is not pathological. The feeling seems grounded on a sense of our responsibility for damage to what we value, anger at oneself because of it and a disposition to repair.⁷²

The essay we have just discussed, 'Guilt and Suffering', leaves us with a much deeper sense of guilt than 'Persons and Punishment'. In the third consecutive essay I consider, 'Shared Guilt', Morris takes us deeper still. Curiously, the essay starts by coming back to a legal conception of guilt, wrongdoing and associated concepts including responsibility,⁷³ blameworthiness, intention, attempts,

change. At the risk of pushing the relevance of 'quantum' too far, I also see a link between Schrödinger's cat experiment in quantum theory and quantum guilt. In the experiment, the cat is neither dead nor alive until it is observed. The same could be said of a person in a cycle of being guilty, saying sorry and making amends. Until one's consciousness is raised and one is able to deeply reflect on why one does self-defeating things, one is unable to fundamentally change. The observation of the unconscious comes about through a person's 'third eye'—the 'I' in me that is me but not me.

70 Murphy, n 12 above, 342.

71 Evidence of this carryover includes remarks about the inclination people have to feel guilt and not 'some other way' which might be more painful because restoration is thought to be 'impossible', and references to shame being about 'the look' as opposed to hearing the voice of conscience in the context of confessing guilt: see Morris, n 1 above, 97 and 103 respectively. The carryover continues in the next essay 'Shared Guilt' where there are more explicit references to the distinction. For instance, Morris returns to the idea that fault is essential to guilt but not shame, that guilt involves a damaged relationship with others where shame does not, and that guilt generates an imbalance that must be restored whereas shame cannot be alleviated by 'confession, making amends, asking forgiveness, or receiving punishment': *ibid.*, 134–135.

72 H. Morris, 'Reflections on Feeling Guilty' (1981) 40 *Philosophical Studies* 187, 192.

73 Brief mention is made, however, of the distinction between 'retrospective' and 'prospective' responsibility and how, following Freud, a person needs to recognise both aspects if they are to change: see Morris, n 1 above, 119. This links to the quantum guilt example in the previous essay where, in order for the man to take responsibility for change, he has to reflect on and recognise the past and how he is responsible for the way he is. A distinction between the law holding responsible and a person taking responsibility is evident here. For a more developed account of this idea, see C. Reeves, A. Norrie and H. Carvalho, 'Between Persecution and Reconciliation:

complicity, and omissions. This is in fact Morris's most legal argument. Yet towards the end of this essay, when Morris engages with the question of failure to prevent evil, guilt is once again opened up. Under a moral-legal guilt framework, guilt is connected with fault and to reasonable demands that might be placed on a person, leading to a concept of reasonable and unreasonable conduct. The bulk of Morris's argument goes towards showing how legal categories can be pushed to include further situations where a person might be guilty in law. However, talk of reasonableness in the law means there is a balance to be struck, a balance that can only be brought about by a deeper reflection on our moral condition. It might be reasonable to omit to act in a way that could prevent suffering, but in so judging, 'we may have unwarrantedly favoured our own interests over those of others'.⁷⁴ A person may have acted in accord with all reasonable expectations of them as 'a reasonable man'. But does this mean that there was nothing more that the person could have done? To illustrate this, Morris quotes a paragraph from Karl Jaspers in *The Question of German Guilt*:

When our Jewish friends were taken away, we did not go out into the street and cry aloud until we also met our death. We preferred to remain in life for the weak, even if justifiable, reason that our death would not in any way have helped. It is our own fault that we are still alive ... It demands that we should take on us the consequences of being alive in such conditions.⁷⁵

This is not a form of moral-legal guilt, and nor is it a kind of moral-psychological or quantum guilt, though it is a situation where guilt may be experienced. Jaspers is trying to capture the guilt of the German people who did not fight against the Nazi regime. Morris notes that there are actually two different states that he is describing. One is failing sufficiently to prevent evil. The other is not so much a failure *per se*, but rather 'remaining alive when others had their lives unjustly taken'.⁷⁶ Jaspers is not entirely clear on whether he means to say that we should feel guilt at not having done enough or whether we should feel guilt regardless of what one did or did not do.⁷⁷ Perhaps it should be both. In either case a person may feel what can be labelled 'guilt', but 'when Jaspers talks of fault and guilt in the circumstances in which he does, the idea of guilt, because fault conditions, normally associated with guilt, are absent, *it is merging into something else*'.⁷⁸ This could be either for being German, or for not doing enough, where not doing enough included all things that one could have done that remained beyond moral or legal duty. In recognising this 'something else', Jaspers uses the term 'metaphysical guilt', but Morris says 'I think this phenomenon may also be described as "self-guilt" or "guilt before oneself"

Criminal Justice, Legal Form and Human Emancipation' in E. Christodoulidis, R. Dukes and M. Goldoni (eds), *Research Handbook on Critical Legal Theory* (Cheltenham: Edward Elgar, 2019).

⁷⁴ Morris, n 1 above, 133.

⁷⁵ *ibid.*

⁷⁶ *ibid.*, 134.

⁷⁷ See also A. Norrie, *Justice and the Slaughter Bench: Essays on Law's Broken Dialectic* (Abingdon: Routledge, 2017) ch 6.

⁷⁸ Morris, n 1 above, 134 (emphasis added).

or perhaps best “shame”.”⁷⁹ It is not readily apparent how Morris arrives at the idea of ‘guilt before oneself’ and how this is analogous to shame.⁸⁰ Morris’s suggestion for the relevance of shame to metaphysical guilt is the absence of fault and restorative responses: ‘... being metaphysically guilty does not imply a rupture in established moral relations with others. Thus nothing may be re-established by confession or repentance or forgiveness or punishment’.⁸¹ Unlike guilt, where wrongdoing is connected to the severing of a relationship and we speak of ‘fault, restoration, confession, making amends, repentance, forgiveness, punishment, justice, excuse’,⁸² there is no fault with metaphysical guilt and no amends to be made. The bad feeling looks more like shame. Failing to do the extraordinary (as in the case of metaphysical guilt) may result in feeling ‘that we are less than we would like to be’ and that ‘doing and failing to do things that, while ultimately involving harm to others, are most directly crimes involving ourselves, crimes that consist in one way or another in failures of integrity, failures to be and to act as our conception of ourselves dictates’.⁸³ Feeling less than we would like to and failing to be and/or act in accordance with the ideal we have of ourselves can describe the feeling of shame. But as Morris himself acknowledges, it can equally describe the feeling of what he calls guilt ‘before oneself’. There exists a liminal point where guilt and shame come together; where one term is not more appropriate than the other. Rather, both are required for an authentic account of the phenomena.

In metaphysical guilt, both guilt and shame are implicated. There is guilt at failing to act when one had an obligation in morals, if not in law, and guilt at being part of a species that does evil things. There is also shame of two kinds. One kind of shame arises from being a person who lives in a world where evil things can happen. This is different from feeling shame about the person you are compared to who you thought you were or want to be that makes you question your integrity. It is still a kind of shame, but in the way that Morris uses the term, it is ultimately shame about the human species as a whole. One could say that they are the same thing because by virtue of reflecting on the human species you are also reflecting on yourself as you are a part of that species. But the former sense of shame reflects a different aspect of our moral condition; our participation in a particular form of species being. Feeling shame at the person you are, on the other hand, manifests in the guilt that stems from

79 *ibid.* The UB40 song ‘British Subject not Proud of it While I Carry the Burden of Shame’ is a good example of the overlap between feeling metaphysically guilty and shame. UB40 sing about the burden of shame but they also say they are to blame. In other words, by virtue of blame they are all guilty. While this relates to metaphysical guilt precisely, like Morris, UB40 also describe this as shame.

80 I suggest this phrase may have been influenced by Martin Buber’s 1965 essay ‘Guilt and Guilt Feelings’ which is partially reproduced in the collection of papers edited by Morris: Morris, n 8 above. In his account of existential guilt, Buber discusses how, in the process of self-illumination, a person feels ‘guilty toward himself’: see Buber, n 8 above, 147. The idea of guilt before oneself seems equally relevant to quantum guilt. Indeed, one wonders why the phrase ‘guilt before oneself’ in Morris only appears in relation to metaphysical guilt and not before as it would seem to have a legitimate place in the earlier discussions.

81 *ibid.*

82 Morris, n 1 above, 134.

83 *ibid.*, 134–135.

omissions and/or not doing enough, including all the things that one could have done that remained beyond legal or moral duty. It also manifests in those who identify with people who did bad things (for example the German who feels bad because of what the Germans did). All senses of metaphysical guilt are united by a question of responsibility in circumstances where a person is part of a set of social relations or a social structure that engenders harm. While a person may not be responsible under a moral-legal guilt framework – that is, everything they did/did not do was morally acceptable according to law – they nonetheless feel guilt *and* shame: guilt for not having acted, and shame at that, and guilt and shame at being of a species that could act in such a way.

IDENTIFICATION AND THE GUILT TYPOLOGY

Through tracing and deconstructing Morris's argument, as he works against his own initial premise, I have identified a four-fold typology of guilt. As Morris moves away from political theory and reaches out towards the metaphysical, other kinds of guilt emerge that are not easily incorporated in a legalistic framework. What remains to be explored is why it is that a person might feel these kinds of guilt. What is it about the relationship between oneself and another or others that results in different types of guilt? It is that question to which I now turn. In answering it, we will also explore more fully how the different kinds of guilt operate, both together and apart.

In a later essay, 'Nonmoral Guilt' (1987),⁸⁴ Morris again reinforces his dissatisfaction with moral-legal guilt, by which he means guilt arising from culpable wrongdoing where fault and responsibility are present. It is necessary to begin with a note on terminology. Morris confusingly calls what he means to be moral-legal guilt, 'moral guilt', despite the fact that this does not refer to broader moral kinds of guilt, and is effectively legal in its form.⁸⁵ Morris challenges the monopoly of what he calls 'moral guilt' (ie legal or moral-legal guilt) over what is regarded as appropriate in guilt feelings and when it is deemed appropriate to feel guilty. In so doing he is challenging the monopoly moral-legal guilt has over the field of guilt, counterpointing to this non-legal forms of guilt, which he calls, logically in like terms, but otherwise confusingly, 'nonmoral guilt'. He then proceeds to explore cases of this 'nonmoral guilt' where a person is *not* deemed guilty in the sense of being 'culpably responsible for wrongdoing'.⁸⁶ The confusion is seen in that he says that in such 'nonmoral' cases, the 'guilt incurred by the person derives from what may fairly be described as a fundamental moral posture toward the world'.⁸⁷ It is, therefore, reasonable to question the use of the term 'nonmoral' guilt as it is in fact, by his own admission, still

⁸⁴ Morris, n 25 above.

⁸⁵ I suggest this is symptomatic of the field and some of the problems identified in Morris's writing—namely, that he never really addresses what was wrong with his starting point. He proceeds to invalidate it without ever being critically reflective of where he started which suggests he is unaware of his own self-deconstruction.

⁸⁶ Morris, n 25 above, 222.

⁸⁷ *ibid.*

moral. The problem can only be addressed by recognising that what Morris calls 'moral' guilt is in fact guilt within a legal framework, while 'nonmoral' guilt means guilt beyond such a framework, which is moral in a broader sense. Once we overcome this hurdle, we can see the importance of Morris's account for understanding how guilt works through 'identification'. In what follows, I consider the place of identification as a moral and psychological mechanism in guilt feelings across the four forms. I show how identification operates as a modality through which guilt (and shame) is expressed across the field, but differentially according to the guilt category. At the core of all guilt is a need to be 'at one ... with others and oneself'.⁸⁸ Identification helps to identify who it is that one is primarily not 'at one' with, be it other citizens (moral-legal guilt), another or others (moral-psychological guilt), oneself (quantum guilt), or the world (metaphysical guilt).⁸⁹

In the case of moral-legal guilt, identification is present only on a formal level. A person is found culpably responsible for wrongdoing and is thus deemed guilty by an authority that is acting in the interests of civil society. The guilty party might despise the person that they violated, but still submit to moral-legal guilt because they recognise that, as a citizen, this is what they are obligated to do. Therefore the person formally identifies with the citizenry to which they belong. In violating another, a debt is owed to society for taking advantage, and the balance of benefits and burdens must be restored. Such a person would feel guilt before an authority, but not guilt before another.⁹⁰ As the concept of guilt is opened up, however, identification becomes broader and more significant.

With moral-psychological guilt, a person clearly identifies with another or others. This identification is felt psychosomatically. That person feels bad about (and pain as a result of) being separated from union with another and no longer whole. Identificatory ties with that union are present because of social or interpersonal solidarity. Thus the person feels guilt before another or others with whom they identify, and a yearning to restore union and be re-joined. Additionally, they feel a division within themselves and painful antagonism towards themselves for acting against that which they value. This guilt before another also gives rise to a form of guilt before oneself that is different from the sort of guilt before oneself experienced with quantum and metaphysical guilt. Here, the person experiences a kind of self-reproach 'identifying in so doing a present self with a past self'.⁹¹ The person wants to be at one again with themselves so that they can once more feel complete or whole. Their identity and integrity has, to some extent, been jeopardised because they no longer feel wholeness. Thus the person might feel shame for being the sort of person who acted against

88 Morris, n 1 above, 100.

89 This is, of course, an oversimplification. For instance, as will become apparent in the discussion that follows, quantum guilt and metaphysical guilt are both also other-regarding. Similarly, not being at one with oneself is an element of moral-psychological guilt but it takes on a different inflection here compared to quantum guilt and metaphysical guilt.

90 Guilt before another would be present if one views their violation in purely relational terms. For instance, a person might despise the legal system and have no respect for it, but nonetheless feel that the person that they injured was also a human being and not feel right about that. This is the sort of identification that sits under moral-psychological guilt.

91 Morris, n 25 above, 239.

what they value.⁹² But their motivation is to return to a prior state of atonement with themselves and others that existed before the wrongdoing. So while a form of guilt before oneself is experienced, this retrospective self-criticism sits under a broader, more dominant feeling of guilt before another/others that is part of the process of getting back to a state of atonement. Within an atonement structure, the relationship one has with others is fundamental to their being. Thus moral-psychological guilt is first about identification with another, then, second a self-identification. In that second form, we see the germ of quantum guilt and shame. These can only be developed through the deeper reflection quantum guilt entails.

In quantum guilt, feeling guilt before oneself is the dominant feeling that may prompt a person to want to fundamentally change who they are and who they will be. This sort of guilt before oneself is further distinguishable from moral-psychological guilt by its introspective character that subsequently takes one into the territory of psychoanalysis.⁹³ What within me is interfering with the love I would like to have for another and myself? This is not merely self-reproach. Questioning the self in this way signifies that the person is reflecting deeply and inwardly on why it is that they repeatedly harm another person that they love.⁹⁴ It is a pattern of behaviour that is being reflected on, not a single act. But there is something else going on. Reflecting on one's persistent guilt in this way also inevitably forces one to imagine what might happen if the historical pattern persists. This also fuels guilt feelings because 'imagined activity in which we identify with some future self might also result in our feeling guilty in the present'.⁹⁵ Not only does the person feel guilt in the present for their persistent wrongdoing in the past, signifying identification with the victim, they also feel guilt in the present about the imagined activity of their future self. The identification in question is, therefore, with one's own sense of self or 'identity that extends over time'.⁹⁶ The repeated guilt of the past self is the catalyst for feeling guilt before oneself in the first instance. This is guilt as self-identification in terms of one's past, present and future.

Identification operates differently again in metaphysical guilt. Taking survivor guilt as an example, here the guilt felt does not arise from failing to fulfil obligations. Rather it comes 'from being in an unjust position with regard to those with whom one identified'.⁹⁷ This sort of guilt not only marks 'one's attachment to principles of fairness and justice', it also makes apparent 'one's

92 The sort of shame I refer to here that stems from a loss of wholeness is a mature form of shame – that is, reflecting on one's integrity or character as a person with a developed sense of self in relationship to others. cf the lack of wholeness in primitive shame rooted in primary narcissism and omnipotence: see Nussbaum, n 27 above, 192.

93 See also A. Norrie, 'Animals Who Think and Love: Law, Identification and the Moral Psychology of Guilt' (2019) 13 *Criminal Law and Philosophy* 515, which links ethical and psychoanalytic accounts of identification.

94 It is not essential to quantum guilt that the person who is wronged is someone that the perpetrator loves. A person could feel guilt before oneself for being the sort of person who repeatedly gets drunk and hits complete strangers, or for being the sort of person who repeatedly shoplifts.

95 Morris, n 25 above, 239.

96 *ibid.*

97 *ibid.*, 236.

solidarity with others'.⁹⁸ The sort of guilt felt in the case of survivor guilt and other examples of metaphysical guilt tracks 'the scope of one's identificatory ties with the less fortunate, those before whom one feels guilty'.⁹⁹ This can also explain why a German might feel guilt about *being* German. As Morris explains, '[b]ecause they have defined themselves in a manner that reveals identification with others, the actions of those others are granted a power over them determining their feelings and obligations. Individuals may in these circumstances believe themselves guilty'.¹⁰⁰ This should not be conflated with the sort of guilt before another (or others) that we find in moral-psychological guilt and quantum guilt. The metaphysically guilty person is not responsible for the wrongdoing or evil in question, but they nonetheless feel guilty. Feeling guilt in this scenario is plausible because it signals deep identificatory ties with another. These ties can even extend to 'a scope of identification that embraces the human race',¹⁰¹ as in the case of persons who feel *shame* for being human or for living in a world where evil things can happen. The specific form of identification relevant to metaphysical guilt is embodied: '[w]e imagine their feelings, thereby "entering into" them ... [and actually] have the feelings we imagine them to be having ...'¹⁰² as opposed to responding to those feelings in a sympathetic way. The person with whom one identifies (for example the German who identifies with a German who participated in the Nazi regime) may not feel guilt for themselves, but the nature of identification at play in metaphysical guilt transcends this. In embodying the feelings of another or imagining 'how one would oneself feel' (even if that person did not feel those things), the person who feels metaphysically guilty grasps 'emotionally how much of the good one possesses cannot be tallied on the credit side of our personal moral ledger sheet'.¹⁰³ Feeling guilt and shame in the case of metaphysical guilt signals a healthy moral disposition towards others and about one's place in the world.

Identification is a mechanism through which different forms of guilt are expressed. It helpfully identifies the psychological basis for feeling guilt (and/or shame) and shows how the nature of the identification differs depending on the type of guilt that is expressed. As discussed above, a person who feels guilty may identify in a limited way (as in the case of a person who feels guilt before an authority only) or their identificatory ties may be so magnanimous that they extend to all human beings. Identification also provides a justification for the relevance of moral-psychological, quantum and metaphysical guilt to a broad spectrum of offences, not just offences against the person. For example, there would be nothing precluding a person from feeling metaphysical guilt for crimes against the environment or other species if their identificatory ties extended to the actual world.

⁹⁸ *ibid.*, 237.

⁹⁹ *ibid.*

¹⁰⁰ *ibid.*, 240.

¹⁰¹ *ibid.*

¹⁰² *ibid.*, 239.

¹⁰³ *ibid.*, 237.

WISDOM FROM A FOXY HEDGEHOG

In this final section, I will briefly indicate how I think we can use Morris's analysis by treating him as a foxy hedgehog – that is, as one who operates at the border between conventional legal and political normative theory, and a broad-ranging interest in what might lie beyond. This is not to impoverish his thinking in my view, but to show the potency of his imaginative approach to the legal field. I can only do so in broad terms, but I will, first, seek clearly to identify what seeing Morris in my terms entails, and, second, consider his relevance for taking criminal justice theory forward, particularly with reference to a critical understanding of restorative justice.

What can we learn from analysing Morris's arguments, and his journey in making them? Those interested in normative political theory are likely to want to do one of two things. Either bring law into Morris or bring Morris into law. From this standpoint, one might want to focus on how some of what Morris has to say could fuel a theory of punishment.¹⁰⁴ Or they might direct their efforts to showing how his insights could be used to generate standards and rules. For instance, one might want to set boundaries on the appropriateness of guilt and regulate it; claiming that guilt must be referable to some normative standard.¹⁰⁵ The essence of such a standpoint is to maintain a separation between a law-based approach to guilt and/or punishment and other approaches to guilt and/or punishment. It is to maintain a sense of a legal sphere that is separate from non-legal spheres. From this point of view, moral-psychological, quantum and metaphysical guilt may have relevance, but only in their interaction with law

104 One pursuing this agenda may take inspiration from Morris's later article 'A Paternalistic Theory of Punishment'. For instance, they might seek to map the typology to what Morris says in that paper about punishment being justified for the 'good' of the person to strengthen and further that argument. Accordingly, they might suggest that the sort of restoration that accompanies moral-psychological guilt can be brought about through top-down, state-imposed punishment. Such a suggestion would, however, contradict Morris's own belief that punishment is never 'restorative of close relationships defined by feelings and attitudes', and undermine his contention that punishment has no role 'in contexts where moral wrong is done a stranger or where friendship or love relationship based on affection, respect, and trust has been damaged': see Morris, n 1 above, 104–105. The most he is prepared to admit is that punishment may restore 'a certain disrupted rule–establish equilibrium of benefits and burdens': *ibid.*, 104. Of course, it is also the case that Morris did not himself fully pursue the lines implicit in these broader strands of enquiry. In some of his works on punishment (for example his benefits/burdens theory), Morris remained in my terms the hedgehog.

105 See, for example, J. Deigh, 'All Kinds of Guilt' (1999) 18 *Law and Philosophy* 313. As I see it, there are two problems with this approach. The first is that Morris's objections to it are clearly outlined in 'Nonmoral Guilt' where he critiques law for having a monopoly on the appropriateness of guilt. Second, and related to the first, the problem with Deigh's account is that he tries to tack objective standards onto the phenomenology of guilt as a way of regulating aptness. My own view is that from a moral psychology perspective it would be good to feel guilt, however, I ground this assessment in the terms of Aristotelian virtue ethics not political theory. Following Jonathan Lear, the non-rational soul (psyche) is important to ethical flourishing and 'ethical virtues are excellences of the non-rational soul': see J. Lear, 'IV—Integrating the Non-Rational Soul' (2014) *Proceedings of the Aristotelian Society* 75, 92. Thus, feeling appropriate emotions (for example moral-psychological guilt, cf neurotic guilt) and working through them is good in terms of a flourishing life. From this perspective, the sorts of questions that concern political theorists, such as when it is normatively correct or apt to feel guilt, are vulnerable questions.

or a legalistic conception. My suggestion is that this identification of a legalistic concept is too hasty because the way in which law operates in the criminal justice field is across a series of practices that include recognition of the different kinds of guilt. Put differently, so-called legal justice, in opposition to non-legal spheres, is characterised by thinness and lack. That is why criminal justice always reaches beyond law and into other spheres.¹⁰⁶ In keeping with this argument, I want to draw attention to a different, more meaningful and productive way to take up Morris's rich insights that takes seriously his caution not to 'accept some simple formula with the belief that it captures the rich variety of the world'.¹⁰⁷ Instead of seeing Morris as identifying non-legal conceptions of guilt alongside a legal conception, I propose that what Morris identifies is a broader sense of a legal field in which these different, apparently conflicting conceptions encounter each other, and are only maintained by practices, not conceptually.¹⁰⁸ This means that these conceptions are *all* relevant to an understanding of the way the law works.¹⁰⁹ While guilt does exist in different forms outside law, if we follow the lines of his argument, Morris's point is that once law is properly understood as a broader legal field, then we see how these different forms of guilt exist *in* law.

Tracking Morris's journey from legal and political theory through his moral psychology and onto the metaphysical, as I have done, is not to think about a different way of concretising or applying theory *to* law. It is to think about how theory can set up the critical relationship *between* theory and law in terms of a broader account of law. As Morris opens up the concept of guilt and deepens it, we come to see that guilt operates on different levels in relation to law. Moral-psychological, quantum and metaphysical guilt engage with guilt at conscious and unconscious levels that are relevant to an understanding of law. For instance, in quantum guilt, a person's unconscious is tapped into as they reflect on their patterns of behaviour, taking us into psychoanalytic territory.¹¹⁰ Moral-legal

106 An example of this would be the nature of the discussion around restorative justice. See, for example, A. von Hirsch, J. Roberts, A.E. Bottoms, K. Roach and M. Schiff (eds), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms* (Oxford: Hart Publishing, 2003).

107 Morris, n 1 above, 87.

108 A counter argument to this would be to say that, from a legal normative point of view, that that is not how the legal field understands itself. My point is that Morris provides a compelling rejoinder to this that shows precisely why such a position is problematic, for it serves to reproduce the very problem it denies.

109 This line of thinking is further explored in Morris's exchange with Jeffrie Murphy on forgiveness: see H. Morris, 'Murphy on Forgiveness' (1988) 7 *Criminal Justice Ethics* 15.

110 This should not be read as analogous to advocating for a therapeutic model of crime control. Morris's objections to 'therapy' are clearly outlined in 'Persons and Punishment'. Psychoanalysis, on the other hand, is not something 'done to' a person. Rather, it is a process of understanding that seeks to 'shed light on the human condition': see J. Lear, 'Wisdom Won from Illness: The Psychoanalytic Grasp of Human Being' (2014) 95 *International Journal of Psychoanalysis* 677, 677. Morris clearly sees value in engaging with psychoanalysis as evidenced by references to John Wisdom and Sigmund Freud in *On Guilt and Innocence* and the inclusion of essays by Gerhart Piers, Erik H. Erikson, and Sigmund Freud in his edited collection *Guilt and Shame*. Of course, not all kinds of psychotherapy respect human beings as persons, promote individual agency, freedom and a capacity for reason. But the sort of Aristotelian psychoanalysis that Jonathan Lear promotes is precisely concerned with respecting human beings as thinking, feeling and acting persons: see Lear, n 105 above.

guilt and the process of liberal judgement only operate on the level of 'rational' consciousness.¹¹¹ It is Morris's strength that he sees this. His explorations push legal engagement into moral psychological, quantum and metaphysical areas. The problem in Morris, however, is that he never fully addresses what was wrong with his starting point in the sense that he unfolds it without being critically reflective of where he started so that unfolding becomes self-deconstruction (conscious or otherwise). This is significant because, in the process of invalidating his false starting point, guilt takes on a broader and deeper meaning that ends up questioning the boundaries of guilt and shame, and operating as a critique of moral-legal guilt. To see an elision in Morris is therefore consistent with the way he unfolds his discussion and where his thoughts lead him. If Morris were to stay true to his political theory leanings and the normative framing of guilt, then moral guilt would remain firmly wedded to the political community as a communitarian strategy. This would shut out the possibility of thinking through the implications of moral-psychological, quantum and metaphysical guilt for an understanding of law and legal theory. Yet he proposes all three of these concepts.

As noted in the introduction, one way of reading Morris's work would be to see it as a culminating, systematic theory of punishment in which a rich, systematic conception of guilt develops. From that perspective, an approach that views his project as fragmented and as pointing in different directions might put forward a concept of guilt that is diminished. Even if a thicker, multi-layered concept of guilt emerges, it might be said that this is a concept of limited applicability. I do not intend to contest this point – it is a valid inference if one understands what Morris is doing as offering a legal method as opposed to a sense of a broader legal field. Indeed, my point has been that this is precisely what makes the typology that unfolds through the immanent critique of Morris so critically interesting because it uncovers different conceptions of guilt in law that splitting off legal from non-legal conceptions obscures. It can also take us to an understanding of something like the relationship between law and restorative justice which I will attempt to outline in the next sub-section.

Restorative justice: a way forward?

Once we follow Morris's metaphysical trajectory and move away from the narrow lens of political theory, certain questions become vulnerable. One example

111 Staying true to his metaphysical trajectory, Morris's most recent work points to conscience being 'but one expression of our soul': see H. Morris, 'On the Soul' (2018) 94 *Philosophy* 221, 234. He goes on to say that, when active, the conscience 'invariably triggers the self's moral appraisal of some matter within the scope of one's conscience – a feeling, an attitude, an action', however, it is the soul 'not conscience, [that] is activated by the destruction of whatever it is to which one is deeply attached': *ibid.*, 235. Jonathan Lear takes what I am suggesting here further in his discussion of integrating the non-rational soul (ethical virtue) with the rational soul (reason). Lear's point is that when both 'speak with the same voice' one can achieve human flourishing, and that psychoanalysis can be an aid in this task because it 'aims to change the structure of the psyche, by facilitating communication between the non-rational and rational parts of the soul': see Lear, *ibid.*, 92.

is the discord between Aristotelian virtue ethics and questions of appropriateness in relation to standards and rules.¹¹² The same is true if we start to apply Morris's metaphysical insights to current criminal justice practices that are framed by a liberal political philosophy. A good example of how this quickly goes awry is Antony Duff's parlay with virtue ethics where he attempted to sketch an account of criminal liability using Aristotelian virtue theory.¹¹³ While he uses his unsuccessful deliberations in this paper as a means of turning away from Aristotelianism and towards state punishment, I see them as an invitation to take our thinking and practices in the opposite direction—not down the path of remaking law so that it is character-full, but rather to reach out to something else beyond law, which can be counter-posed to it, and brought into dialogue with it. I accept Duff's conclusion that the judgement of deep character is not something that law (as a process of liberal judgement) could do, but this does not mean that it is not important. If law cannot reach these deeper levels, that is not to say that they are not where the change would occur.¹¹⁴ This is where I think restorative justice has something to offer. The concept of quantum guilt could be built up further and translated into restorative practices that would pave the way for moral-psychological restoration.¹¹⁵

The problem with restorative justice, however, is that it does not have an adequate ethical foundation to ground itself in. Whether restorative justice is about shame, guilt or remorse remains open to debate¹¹⁶ because it lacks a 'synthetic account of what it means in the terms of ethical theory'.¹¹⁷ Following John Braithwaite's account of reintegrative shaming theory, shame has long been a

112 See text to n 105 above.

113 A. Duff, 'Virtue, Vice, and Criminal Liability: Do We Want an Aristotelian Criminal Law?' (2002) 6 *Buffalo Law Review* 147. Not surprisingly, Duff finds an incompatibility between Aristotelian virtue ethics and a liberal political theory of criminal law.

114 Incidentally, Morris's views on character are, given his being a foxy hedgehog, understandably mixed. In 'A Paternalistic Theory of Punishment', Morris explicitly suggests that the goal or target of the paternalistic theory he puts forward is not one's 'moral health', but rather 'one's general character as a morally autonomous individual attached to the good': see Morris, n 9 above, 266. cf his response to Garvey's suggestions about moralising shame where he cautiously notes that '[t]he factors that bear on whether or not one feels a certain way are so various and numerous that one should be hesitant to draw inferences about the person's character from the person's not having an emotional reaction on a particular occasion': see Morris, n 17 above, 139.

115 I include here the sort of non-legal restoration that moral-psychological and quantum guilt would give rise to. The relevance of restorative justice to metaphysical guilt would be different. What I take from metaphysical guilt is not a path to restoration *per se*, but an ontological framework of shared responsibility that lies beyond law. For an account that directly links moral-legal responsibility with metaphysical guilt, see Norrie, n 77 above, ch 7.

116 See, for example, G. Maxwell and A. Morris, 'The Role of Shame, Guilt, and Remorse in Restorative Justice Processes for Young People' in E.G.M. Weitekamp and H.-J. Kerner (eds), *Restorative Justice: Theoretical Foundations* (Cullompton: Willan Publishing, 2002); A. Morris, 'Shame, Guilt, and Remorse: Experiences from Family Group Conferences in New Zealand' in I. Weijers and A. Duff (eds), *Punishing Juveniles: Principle and Critique* (Oxford: Hart Publishing, 2002); B. Van Stokkom, 'Moral Emotions in Restorative Justice Conferences: Managing Shame, Designing Empathy' (2002) 6 *Theoretical Criminology* 339; Nussbaum, n 27 above; G. Taylor, 'Guilt, Shame and Shaming' in I. Weijers and A. Duff (eds), *Punishing Juveniles: Principle and Critique* (Oxford: Hart Publishing, 2002).

117 A. Norrie, 'Love in Law's Shadow: Political Theory, Moral Psychology and Young Hegel's Critique of Punishment' (2019) 28 *Social & Legal Studies* 10, 26.

foundational concept of restorative justice.¹¹⁸ In recent years, however, even Braithwaite has come to see that this might be oversimplifying. Shame-Guilt has since become a category in its own right following Harris's empirical finding that both shame and guilt are induced together.¹¹⁹ This finding inspired a rethink of the normative emphasis of reintegrative shaming (that is, shaming the act but not the person who did the act).¹²⁰ Yet the Shame-Guilt category remains undeveloped and lacks a proper grounding in philosophical analysis.¹²¹ What does Shame-Guilt actually mean? Does it signal a merging of the two categories? If so, how and on what terms do these categories merge? Can you easily shift from speaking about one to the other? In questioning the boundaries between guilt and shame, and pointing towards a fuller understanding of these terms and how they relate to each other, Morris's work has particular relevance for restorative justice. Specifically, it offers a way of understanding the relationship between shame and guilt that may be of assistance to restorative justice, especially in terms of adding much needed ethical-theoretical flesh to the bones of the Shame-Guilt category. From this point of view, restorative justice might develop a robust and broad conception of guilt with which it could engage the narrow categories of traditional moral-legal guilt.

In arguing for the truth of Murphy's suggestion that 'the moral phenomenology' at play might be 'too complex to be captured by either concept',¹²² I have shown that while the deepest forms of guilt, such as those that characterise quantum and metaphysical guilt do abut shame, this does not mean that guilt

118 Braithwaite, n 30 above, viii. To clarify, I am not suggesting that reintegrative shaming is the same as restorative justice, however, it is commonly acknowledged that the former has significantly influenced the development of the latter. See, for example, N. Harris and S. Maruna, 'Shame, Shaming and Restorative Justice: A Critical Appraisal' in D. Sullivan and L.L. Tiff (eds), *Handbook of Restorative Justice: A Global Perspective* (London: Routledge, 2006). While the suggestion that restorative justice processes should harness shame is not uncontroversial, it nonetheless remains a key theoretical construct of restorative justice.

119 N. Harris, 'Shaming and Shame: Regulating Drink-Driving' in E. Ahmed, N. Harris, J. Braithwaite and V. Braithwaite (eds), *Shame Management Through Reintegration* (Cambridge: Cambridge University Press, 2001) 73. Harris's 2001 factor analyses study challenged a longstanding body of empirical work that distinguished shame-proneness from guilt-proneness. It is important to note, however, that Harris's study was concerned with empirically testing the dimensionality of shame (not guilt) which led to the emergence of three 'dimensions of shame', of which Shame-Guilt is one.

120 Braithwaite et al now admit that this might be a 'normative error': 'If a man rapes a child or is repeatedly convicted for serious assaults, is it enough for him to feel that he has done a bad act(s) but there is nothing wrong with him as a person? It would seem more morally satisfactory for him to feel that he has done a bad act and therefore feels he must change the kind of person he is in some important ways (while still on the whole believing he is basically a good person)': see J. Braithwaite, E. Ahmed and V. Braithwaite, 'Shame, Restorative Justice, and Crime' in F.T. Cullen, J.P. Wright and K.R. Blevins (eds), *Taking Stock: The Status of Criminological Theory—Advances in Criminological Theory Volume 15* (New Brunswick, NJ: Transaction Publishers, 2006) 400.

121 Harris gestures that the empirical finding might be explained by Bernard Williams's observation that shame and guilt intuitively operate in tandem. For instance, he suggests that '[i]f someone feels guilt about having hurt another person it would seem odd if they did not also feel some shame because their actions had threatened their perception of the kind of person they are and their perception of how others might judge them': see Harris, *ibid*, 124. However, subsequent engagement with Williams by restorative justice proponents has tended to marginalise guilt and focus on the merits of shame.

122 Murphy, n 12 above, 343.

and shame lose their value as concepts. Instead, they reflect different aspects of a single phenomenon. Restorative justice thinking, in particular, splitting off shame from guilt and running with the former, appears to parallel the mistaken split Morris makes between guilt and shame early on. Restorative justice began by defining itself against *law* (and legal guilt) whereas it should have defined itself against a narrow concept of *moral-legal guilt*, which would have allowed it to express deeper forms of guilt. Given a broader conception, guilt comes back to shame so there is a relation between the categories, but there is also something *in-between* them which means that an expanded notion of guilt should not simply be read as shame.¹²³ The concepts of quantum guilt and metaphysical guilt seem to best capture this richly textured phenomenology. Relating these concepts to restorative justice is work of a different kind for another day.¹²⁴ Given the instability in restorative justice thinking around what its most basic concepts are, at the very least, Morris's work offers a way of understanding the relationship between shame and guilt in moral psychological terms that may be of assistance to restorative justice both in the light of its impoverished ethical foundation and its difficult relationship with law.

CONCLUSION

A seemingly forceful objection to the moral psychology of guilt that I have outlined in this paper would be to draw attention to the truth that the criminal law is imperfect and that its practices rarely (if ever) do justice to the complexity of human nature and experience. Thus, one might say that even if the phenomenology of guilt that has been presented is correct,¹²⁵ it will not be able to be translated into the institutional setting—or at least, not without it

123 What lies at the liminal space between guilt and shame invites further interrogation. I would suggest that a fuller grasp of the psychoanalytic basis of guilt and shame beyond identification alone would be required if we are to understand: 1) the underlying reason for their nexus; and 2) how they might be harnessed in practical terms. On the psychoanalytic basis of guilt, drawing on the work of Sigmund Freud and Melanie Klein, see A. Norrie, 'Taking Guilt Seriously' in I. Solanke (ed), *On Crime, Society and Responsibility* (Oxford: OUP, forthcoming, 2020). On the psychoanalytic basis of shame, see A. Wilson 'Shame, Guilt and Martha Nussbaum's Immaturing Process: Alethic Truth and Human Flourishing' (2020) 19 *Journal of Critical Realism* 4, 380.

124 As a starting point, quantum guilt, as an intensification of moral-psychological guilt with the additional emphasis on deep introspection and fundamental change may provide a good platform from which to advance the sort of ethical foundation that restorative justice needs. The notion of shared responsibility that comes with metaphysical guilt would also seem important to restorative justice ethics given its emphasis on community. Here, I am reminded of the story Braithwaite frequently tells about a boy from an Indonesian village who was caught stealing. In response, the villagers gifted him a bag of rice and remarked '[w]e should be ashamed because one from our village should be so poor as to steal. We should be ashamed as a village': see J. Braithwaite, 'Restorative Justice: Assessing Optimistic and Pessimistic Accounts' (1999) 25 *Crime and Justice: A Review of Research* 1, 20). This sort of shame is not independent of guilt. It is a guilt before oneself or before one's community that is reflected in feelings of shame.

125 On the connection between the typology presented here and perpetrator's own narrative experiences of guilt, see S. Maruna, *Making Good: How Ex-Convicts Reform and Rebuild Their Lives* (Washington DC: American Psychological Association, 2001). I explore the parallels between my typology and Maruna's redemption scripts in a forthcoming paper.

being compromised. This is not, however, a reason to ignore it. Indeed, as I have argued, it is precisely because of this problem that we should pursue it. My aim has been not to repeat the experience of law, but rather to think through what grounds law's problematic character. Thus I have drawn attention to how a more expansive conception of moral guilt can pave a way forward, pursuing different ways of thinking about foundational concepts and practices in criminal justice. In engaging with Morris as a foxy hedgehog, I have attempted to defend a distinction between a normative framing of guilt – that which we find in the concept of moral-legal guilt – and a psychological framing of guilt – as given life in the concepts of moral-psychological, quantum and metaphysical guilt.¹²⁶ More work needs to be done to build up the latter and I have suggested that restorative justice may provide fertile ground for doing so, though it is problematic for the reasons I have identified.¹²⁷

This is important because, in contrast to moral-legal guilt, the transformative potential of moral guilt is significant. As Morris notes, gaining 'insight into our own moral condition may lead us to assume responsibility for becoming different, for becoming persons whom others can understandably care for, trust and respect'.¹²⁸ Yet criminal justice remains wedded to a narrow and limited concept of moral-legal guilt in which a narrow restoration of rights dominates. Thinking about the concept in broader terms can take guilt from a limited legal *form* that facilitates legal restoration to a eudemonic *function* that can give effect to moral-psychological and quantum restoration. It is only through experiencing and working through deeper forms of guilt that one can get to the sort of self-introspection that gives rise to genuine moral-psychological restoration including ethical reconciliation and forgiveness. If we accept that some people who are deemed guilty by law might also *feel* guilt, then there exists a significant gap in ethical logics and practices that we should give serious consideration to. Mainstream criminal justice thinking and practices do not provide for the person who feels guilt and seeks authentic ethical reconciliation.¹²⁹ If it happens,

126 Metaphysics, then, is the logic of these forms at large.

127 While it has not been the intention of this paper to establish an ethical foundation for restorative justice, Morris's account of the deeper, non-legal, forms of guilt and how these forms relate to shame offers a moral psychological basis from which to advance such an undertaking.

128 Morris, n 1 above, 138. In saying this, Morris is moving further away from a narrow, legalistic framework of moral-legal guilt. I read his suggestion as an invitation to move towards a more ontologically authentic view of human agency under which, as he has claimed elsewhere, legal practices like punishment would be 'non-existent, insignificant, or positively perverse' because the relation between persons involved in the violation is based on 'affection, respect, and trust'—or, more precisely, love: *ibid*, 104–105. For a more nuanced account of a love-based ethics and how this can play out in the context of violation, see Norrie, n 116 above; A. Norrie, 'Love Actually: Law and the Moral Psychology of Forgiveness' (2018) 17 *Journal of Critical Realism* 390.

129 This aligns with the thrust of Lacey and Pickard's account, see text to n 5 above. Their work also attends to the ethical life of the legal subject, and they, too, seek to bring out a moral response. However, they look to bring this out through the language of forgiveness whereas my aim is to bring this out through the language of guilt. Although Lacey and Pickard's work does not expressly engage with guilt, I suggest that much of what they advocate for with respect to forgiveness is in fact mediated by guilt. I do, however, question whether forgiveness can be achieved through criminal law in and of itself.

it happens when other things such as retribution or social protection are being enacted. Ironically, thinking about guilt in broader, non-legal terms would enable criminal justice to serve the eudemonic ends that underscore its other functional aims. However, the transformative potential of guilt can only be realised if perpetrators and victims are afforded the opportunity to work with and through it in something like the modalities described here.